

DOCKET NO. CV 18- 6069586 S : SUPERIOR COURT

STRATFORD BOARD OF : JUDICIAL DISTRICT OF FAIRFIELD
EDUCATION, ET AL

V. : AT BRIDGEPORT

BRIDGEPORT BOARD OF : MAY 14, 2019
EDUCATION, ET AL

OFFICE OF THE CLERK
SUPERIOR COURT
2019 MAY 14 PM 3:02
JUDICIAL DISTRICT OF
FAIRFIELD AT BRIDGEPORT
STATE OF CONNECTICUT

MEMORANDUM OF DECISION
RE: MOTIONS FOR SUMMARY JUDGMENT #124 & #126

FACTS

On January 15, 2019, the only remaining plaintiff in the present case, James Feehan, filed a three count amended complaint (#123) seeking redress from the defendants, the Bridgeport Board of Education; the City of Bridgeport; the Mayor of Bridgeport, Joseph Ganim; and the Interim Superintendent of Bridgeport Public Schools, Aresta Johnson—collectively, the city defendants—as well as the state Board of Education and the Commissioner of Education for the state of Connecticut, Diana Wentzell, collectively, the state defendants. As this court has recounted the substance of the plaintiff's claims in an earlier memorandum of decision (#111), what follows is a brief summary of the pertinent allegations.

Count one of the amended complaint alleges that General Statutes § 10-264l (m) (2)¹ violates due process as set forth in the Connecticut constitution, both on its face and as applied,

¹ General Statutes § 10-264l (m) (2) provides: “For the school year commencing July 1, 2015, and each school year thereafter, any interdistrict magnet school operator that is a local or regional board of education and did not charge tuition to a local or regional board of education for the school year commencing July 1, 2014, may not charge tuition to such board unless (A) such operator receives authorization from the Commissioner of Education to charge the proposed tuition, and (B) if such authorization is granted, such operator provides written

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insofar as it does not include a standard by which the Commissioner of Education shall assess the necessity of a particular tuition charge; deprives supplying districts of notice and the opportunity to comment on or challenge the tuition charge; and constitutes taxation without representation. The plaintiff further alleges that the statute deprives him of the following: a conflict-free arbiter as to the necessity and use of a tuition charge, equal protection under the law, the use and enjoyment of private property, and an opportunity to be heard. Count two of the amended complaint alleges that § 10-264l (m) (2) violates the plaintiff's right to home rule. Essentially, the plaintiff alleges that although education policy is a matter of statewide concern, municipal budgets are a local matter and surpluses resulting from municipal taxation are matters of local control. Accordingly, the plaintiff alleges that the funds at issue in the present case are surpluses protected by home rule and that the defendants are therefore prohibited from transferring these funds across district and municipal boundaries. Count three also alleges that § 10-264l (m) (2) violates the plaintiff's right to home rule, though in this count the plaintiff alleges that the city defendants are comingling the funds used to operate the city and the education funds in the same account and that the city defendants are unjustly enriched because

notification on or before September first of the school year prior to the school year in which such tuition is to be charged to such board of the tuition to be charged to such board for each student that such board is otherwise responsible for educating and is enrolled at the interdistrict magnet school under such operator's control. In deciding whether to authorize an interdistrict magnet school operator to charge tuition under this subdivision, the commissioner shall consider (i) the average per pupil expenditure of such operator for each interdistrict magnet school under the control of such operator, and (ii) the amount of any per pupil state subsidy and any revenue from other sources received by such operator. The commissioner may conduct a comprehensive financial review of the operating budget of the magnet school of such operator to verify that the tuition is appropriate. The provisions of this subdivision shall not apply to any interdistrict magnet school operator that is a regional educational service center or assisting the state in meeting the goals of the 2008 stipulation and order for Milo Sheff, et al. v. William A. O'Neill, et al., as extended, or the goals of the 2013 stipulation and order for Milo Sheff, et al. v. William A. O'Neill, et al., as extended."

excess funds from the tuition charge are diverted to different purposes. In each of the three counts, the plaintiff incorporates the following allegation: "The Bridgeport defendants comingle their educational accounts and municipal operating funds."

On January 16, 2019, the city defendants filed a motion for summary judgment (#126), which was accompanied by a memorandum of law and exhibits in support (#127). The state defendants also filed a motion for summary judgment (#124), which was accompanied by a memorandum of law and exhibits in support (#125), on that same date. The plaintiff filed a memorandum of law in opposition to the city defendants' motion (#128) on February 4, 2019, which was accompanied by an exhibit in support. The plaintiff's memorandum of law in opposition to the state defendants' motion (#130) was filed on March 1, 2019. The city defendants filed a reply memorandum (#133) on March 6, 2019, as did the state defendants (#131). The parties were heard on March 7, 2019, at which time the court reserved judgment.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier v. Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012). "Summary judgment in favor of the defendant is properly granted if the defendant in its motion raises at least one legally

sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact." (Internal quotation marks omitted.) *Serrano v. Burns*, 248 Conn. 419, 424, 727 A.2d 1276 (1999).

"The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *Bank of America, N.A. v. Aubut*, 167 Conn. App. 347, 358, 143 A.3d 638 (2016). Accordingly, "[a]lthough the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Escourse v. 100 Taylor Avenue, LLC*, 150 Conn. App. 819, 829-30, 92 A.3d 1025 (2014). "A genuine issue has been variously described as a triable, substantial or real issue of fact . . . and has been defined as one which can be maintained by substantial evidence." (Citation omitted; internal quotation marks omitted.) *United Oil Co. v. Urban Redevelopment Commission*, 158 Conn. 364, 378, 260 A.2d 596 (1969).

The defendants argue that they are entitled to judgment as a matter of law as to all three counts in the plaintiff's amended complaint. First, the defendants argue that the plaintiff lacks taxpayer standing. The defendants contend that there is no genuine issue of material fact that the funds at issue have not been misappropriated or that the plaintiff's taxes have not increased.

Second, the defendants argue that summary judgment is warranted as to the plaintiff's claims because he was afforded due process and because § 10-264l (m) (2) does not violate the Connecticut constitution's home rule provisions. Last, although the issue was not briefed, at oral argument the defendants asserted that the court lacks subject matter jurisdiction over the plaintiff's as-applied challenge to § 10-264l (m) (2).

In response, the plaintiff argues that he has standing, and that the court therefore has subject matter jurisdiction. Specifically, the plaintiff notes that the court, in ruling upon an earlier motion to dismiss, determined that he had standing in the present case, and that the defendants have not persuasively refuted his allegation concerning the comingling and misappropriation of the funds at issue. The plaintiff also contends that deposition testimony to be taken the week of February 3, 2019, is necessary in order to ascertain the allocation of the funds. Accordingly, the plaintiff argues that there are factual and legal issues in dispute that preclude summary judgment.

Standing implicates subject matter jurisdiction; *Cadle Co. v. D'Addario*, 268 Conn. 441, 446, 844 A.2d 836 (2004); and the court must therefore address that issue before reaching the defendants' other arguments because "[o]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented . . . and the court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *Id.*, 444.

"[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003). "It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring

jurisdiction should be indulged.” (Internal quotation marks omitted.) *New England Pipe Corp. v. Northeast Corridor Foundation*, 271 Conn. 329, 335, 857 A.2d 348 (2004).

Generally, “[s]tanding is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause.” (Citation omitted; internal quotation marks omitted.) *J.E. Robert Co. v. Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013).

Taxpayer standing has been described as having a “two-pronged standard of proof—taxpayer status and conduct that has caused or will cause increased taxes or other irreparable injury” *West Farms Mall, LLC v. West Hartford*, 279 Conn. 1, 14, 901 A.2d 649 (2006). “Connecticut has always recognized the jurisdiction of its courts to entertain suits instituted by taxpayers to enjoin the officers of a town from performing illegal acts. . . . It is a fundamental concept of judicial administration, however, that no person is entitled to set the machinery of the courts in operation except to obtain redress for an injury he has suffered or to prevent an injury he may suffer, either in an individual or a representative capacity. . . . It is well settled, however, that [t]here must be more alleged than the mere use by a municipality of tax revenues for an improper purpose in order to confer standing upon a taxpayer who seeks to challenge such action.” (Citation omitted; internal quotation marks omitted.) *Id.*, 12-13. Accordingly, “[t]he plaintiff’s status as a taxpayer does not automatically give [it] standing to challenge alleged improprieties in the conduct of the defendant town. . . . The plaintiff must also allege and demonstrate that the allegedly improper municipal conduct cause[d it] to suffer some

pecuniary or other great injury. . . . It is not enough for the plaintiff to show that [its] tax dollars have contributed to the challenged project [T]he plaintiff must prove that the project has directly or indirectly increased [its] taxes . . . or, in some other fashion, caused [it] irreparable injury in [its] capacity as a taxpayer.” (Internal quotation marks omitted.) Id., 13.

With regard to irreparable injury, our Supreme Court has recognized that “an overwhelming majority of jurisdictions confer standing on taxpayers to challenge the misappropriation of municipal funds. . . . The policy rationale for conferring standing in such circumstances, absent the direct and special injury to the taxpayer generally required, has been explained by one court as follows: The primary basis for taxpayer suits arises from the need to ensure that government officials conform to the law. It rests upon the indispensable need to keep public corporations, their officers, agents and servants strictly within the limits of their obligations and faithful to the service of the citizens and taxpayers. . . . Public policy demand[s] a system of checks and balances whereby taxpayers can hold public officials accountable for their acts. . . . Mindful of this rationale, some jurisdictions require more than a mere allegation of misuse of public funds, and instead apply a fact intensive inquiry to determine whether standing is appropriate under the circumstances.” (Citations omitted; footnotes omitted; internal quotation marks omitted.) *West Farms Mall, LLC v. West Hartford*, supra, 279 Conn. 19-22. The court further recognized that “some of our cases implicitly have suggested that misappropriation of funds may provide a basis for standing.” Id., 22. Nevertheless, the court noted that “[i]n light of the facts of this case . . . we decline to determine expressly whether a taxpayer has standing to assert a claim predicated on misappropriation of public funds and, if so, what, if any, prerequisites the taxpayer must establish to prevail.” Id., 23.

In the present case, the court's previous decision concerning the plaintiff's standing—a decision made pursuant to the defendants' motion to dismiss—resulted in a determination that the plaintiff's standing rested on irreparable injury by way of misappropriated funds, rather than an increase in his taxes. Specifically, the court determined that the plaintiff had not established that his taxes had increased or would increase, and that “although the [plaintiff] [has] established that payment of the tuition charge by Stratford to Bridgeport is almost inevitable, the court is left to speculate as to how Stratford will gather the funds necessary to pay for it.” The court then concluded, however, that “the present case is one in which [the plaintiff] has taxpayer standing on the basis of misappropriation of public funds.”

Although the court has already examined the issue of standing in the present case, the court's earlier determination does not foreclose the arguments offered by the defendants' motions for summary judgment. In *Henderson v. Lagoudis*, 148 Conn. App. 330, 85 A.3d 53 (2014), for example, the Appellate Court affirmed the trial court's decision to reconsider the plaintiff's standing pursuant to a motion for summary judgment. In *Henderson*, the trial court had denied the defendants' motion to dismiss and concluded that the plaintiff had standing to bring his claim. *Id.*, 334-35. Later, the defendants filed a motion for summary judgment, which again challenged the plaintiff's standing. *Id.*, 335. Pursuant to that motion, the trial court determined that the plaintiff lacked standing. *Id.*, 337. Contrary to the plaintiff's argument that the issue of standing was settled by the trial court's first ruling, the Appellate Court determined that the court was entitled to reconsider the issue of standing through the defendants' motion for summary judgment. *Id.*, 338-41.

The court in *Henderson* cited approvingly to *Manifold v. Ragaglia*, 94 Conn. App. 103, 891 A.2d 106 (2006), which established that a motion for summary judgment may challenge

the court's subject matter jurisdiction. In *Manifold*, after the trial court had denied a motion to dismiss for lack of subject matter jurisdiction, the defendants filed a motion for summary judgment that again challenged the court's jurisdiction. *Id.*, 118. The Appellate Court determined that "[a]lthough a motion to dismiss is certainly the preferred means of challenging the court's subject matter jurisdiction, we know of no authority for the proposition that subject matter jurisdiction can *never* be challenged through any other procedural vehicle, most importantly by means of a motion for summary judgment." (Emphasis in original.) *Id.*, 119. "[A] motion for summary judgment can and should be used to address claims for lack of subject matter jurisdiction in certain circumstances, particularly when, as here, a motion to dismiss has been denied, but additional discovery may provide the court with further evidence on which to decide the claim." *Id.*, 120. Accordingly, the court concluded that "the use of the motion for summary judgment to contest subject matter jurisdiction is appropriate in two circumstances: (1) when a party does not become aware of a jurisdictional defect until discovery has progressed; or (2) if, after a court has denied a motion to dismiss on jurisdictional grounds, discovery produces additional evidence that supports dismissal of the action for lack of subject matter jurisdiction." *Id.*, 121-22 n.11.

Manifold further established that when a motion for summary judgment challenges the court's jurisdiction, the court should not treat the motion as it would a motion to dismiss. *Manifold v. Ragaglia*, *supra*, 94 Conn. App. 116-23. "Whereas a motion to dismiss is decided only on the allegations in the complaint and the facts implied from those allegations, summary judgment is decided by looking at *all* of the pleadings, affidavits and documentary evidence presented to the court in support of the motion. The latter standard, therefore, takes account of the facts that have been developed through discovery, rather than merely relying on the

plaintiffs' allegations at the outset of the action. Once litigation has advanced through discovery, the requirement that a court rigidly apply the standard for a motion to dismiss to issues regarding subject matter jurisdiction, even if the issue is presented through a motion for summary judgment, seems to us too narrow an interpretation of the rules of practice. See Practice Book § 1-8 (noting that rules should be interpreted liberally to facilitate business and advance justice). The better approach, we conclude, is for the trial court to treat the motion as a motion for summary judgment, as it was presented, and to evaluate the issue of subject matter jurisdiction on the basis of a thorough review of the pleadings, affidavits and any other documentary proof submitted by the parties." (Emphasis in original.) Id., 120-21.

Notwithstanding the court's earlier ruling on the defendants' motion to dismiss, the court may therefore consider the defendants' argument that the plaintiff lacks standing. It should be noted, however, that as the plaintiff does not appear to presently contest the court's previous determination that he has not established standing on the basis of a tax increase, there is no need for the court to reconsider that conclusion at this time. Although the court is not foreclosed from considering the issue again; *Henderson v. Lagoudis*, supra, 148 Conn. App. 338-41; in the absence of further argument or new evidence, analysis of this particular question would not yield a new outcome.

In their motions for summary judgment, the defendants argue, inter alia, that there is no evidence to support the allegation that the funds at issue were misappropriated. In support, the defendants offer the affidavits of Kenneth Flatto, Finance Director for the City of Bridgeport, and Marlene Siegel, Chief Financial Officer for the Bridgeport Board of Education/ Public Schools. The affiants attest that the budgets and the bank accounts of the city and the board of education are separate and that the proposed city budget and the proposed budget for the board

of education are submitted as discrete amounts to the mayor and the city council for approval. The affidavits further establish that the sum approved for the board of education is ultimately transferred into an account which is solely available to and used by the board of education, and that city employees or officials do not have control over or access to these funds. Finally, the affiants attest that the tuition payments from Stratford to Bridgeport would not go directly to the city, but rather that such payments would be made to the Bridgeport Public Schools. In sum, Flatto and Siegel aver that no comingling of the city's operating funds and the board of education's funds has or could occurred.

In opposition to the defendants' motions, the plaintiff offers the affidavit of Clarence Zachery, the Chief Fiscal and Operations Support Officer for the Stamford Public Schools and the former Chief Operating Officer for the Stratford Public Schools. In his affidavit, Zachery attests that he is familiar with the claims in the present case, but that he has not seen evidence from the financial records from the board of education that identify specific bank account numbers. Zachery further notes that although the city and the board of education deny that any comingling of funds occurred, "verification of said claims in the form of bank account records and/or IRS EIN numbers for the two entities has not been produced."

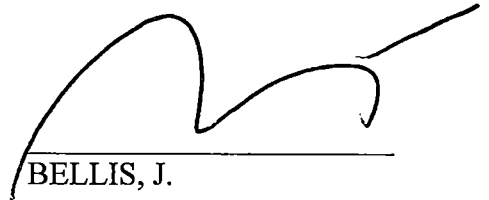
In light of the record presently before the court, the plaintiff has not demonstrated that he has taxpayer standing on the basis of misappropriation of public funds. Although the court had previously determined that the plaintiff did have standing, that decision relied solely on the plaintiff's allegations. Now, in support of their motions for summary judgment, the defendants have presented sufficient evidence contradicting the plaintiff's assertion that the city and the board of education are comingling the funds designated to the board of education and that funds in excess of the board of education's budget are diverted to different purposes. The affidavits

of Flatto and Siegel detail the budgetary approval process and the location and control over the funds provided to the board of education, indicating that the funds provided to the city and the board of education are wholly separate at all times. The affidavit submitted by the plaintiff, on the other hand, merely asserts that the absence of specific evidence positively supports the plaintiff's allegations. By failing to present specific facts contradicting those stated in the affidavits submitted by the defendants, the plaintiff asks this court to rely on speculation and conjecture, which the court will not do. Moreover, to the extent that the plaintiff argues that more time is needed to gather evidence in support of its position, it should be noted that no such evidence has been provided to the court and that the plaintiff has not properly supported this argument.²

The plaintiff's allegations with regard to misappropriation are wholly unsupported, which at this stage of the proceedings is a critical—and fatal—defect. Based on the record before the court, the plaintiff lacks taxpayer standing, as there is nothing to support his allegation concerning the misappropriation for public funds. Due to the plaintiff's lacks of standing, the court is deprived of subject matter jurisdiction; this determination obviates the

² The plaintiff appears to argue that the court should deny or postpone judgment to permit more time for discovery. Although the court could countenance this argument under proper circumstances; Practice Book § 17-47; “[a] party opposing a summary judgment motion . . . on the ground that more time is needed to conduct discovery bears the burden of establishing a valid reason why the motion should be denied or its resolution postponed, including some indication as to what steps that party has taken to secure facts necessary to defeat the motion. Furthermore, under Practice Book § 17-47, the opposing party must show by affidavit precisely what facts are within the exclusive knowledge of the moving party and what steps he has taken to attempt to acquire these facts.” (Citation omitted; internal quotation marks omitted.) *Bank of America, N.A. v. Briarwood Connecticut, LLC*, 135 Conn. App. 670, 675, 43 A.3d 215 (2012). The plaintiff has not carried this burden by baldly asserting, in his brief and in Zachery's affidavit, that some information remains in the defendants' possession.

need to reach the defendants' other grounds for summary judgment. In light of the foregoing, the plaintiff's claims must be dismissed.³



BELLIS, J.

³ Although the court's determination is made pursuant to the defendants' motions for summary judgment rather than a motion to dismiss, granting summary judgment on the basis that the court lacks subject matter jurisdiction would result in an improper judgment. See *Henderson v. Lagoudis*, supra, 148 Conn. App. 344. Rather than granting summary judgment, the plaintiff's claims must be dismissed.